TOYO TEXTILES INDUSTRIES SDN. BHD. & ANOR. v. LIAN FOONG HOUSING DEV. (M) SDN. BHD.

[O.C.J. (Shankar J.) June 27, 1985]

[Johore Bahru – Civil Suit No. 512 of 1977]

Torts – Nuisance and trespass – Interference of natural stream by defendants – Causing flooding and water-logging to plaintiffs' land – Question of liability.

Damages – Quantum – Assessment and principles – Remedial measures – Deposit in court by defendants.

In this case, at all material times the 1st plaintiff owns an undivided half share, and the 2nd plaintiff an undivided quarter share in a piece of land known as Lot 4128, Mukim of Senai Kulai, District of Johore Bahru. The remaining quarter share was vested in one Wong Kit Sing who died in 1981. The defendants are housing developers. The plaintiffs' action is based on nuisance and trespass and they claim damages against the defendants for flooding and water-logging to Lot 4128 caused directly by the defendants' interference with a natural stream which flowed through Lot 4128 and the adjoining land Lot 4127 belonging to the defendants. The plaintiffs alleged that as a result their land Lot 4128 became unusable. The defendants decided to fill their Lot 4127 to a level higher than that of the plaintiffs' Lot 4128 along the common boundary. The result of this earthwork operation was to fill up the natural water course, block it at the boundary line and thereby cause a back-up which created large pools of stagnant water on Lot 4128. The plaintiffs also alleged that the defendants trespassed on Lot 4128 by digging a trench in Lot 4128 alongside its boundary with Lot 4127. The defendants in their amended defence disclaimed any knowledge of water-logging on Lot 4128. Their witness one Chai Teck Fook in fact confirmed the evidence of one Chong Wei Foong, a witness called by the plaintiffs. The learned judge found as a fact that there was a natural stream flowing through Lot 4128 and Lot 4127 in and prior to 1973. Two issues, *i.e.*, liability and damages, call for decision.

Held: (1) the defendants were liable. They had acted completely without regard to the plaintiffs' rights and had acted wantonly and quite unreasonably in all the circumstances. The defendants' conduct is all the more a matter for criticism because having literally created a *fait accompli* in 1973 by raising the level of their land, in the face of the plaintiffs' complaints, they then failed to carry out the remedial measures which they agreed to in 1976 thereby forcing the plaintiffs to come into Court;

(2) for lack of a better yardstick, the learned judge proposed to adopt for damages for loss of use the notional basis that a reasonable return for a landowner in such circumstances is to award him 5% of the capital value of the land from the time its user may reasonably be regarded as having become effective, if not for the floods. The starting point is 1977. An annual loss of 5% of $280,000 gives an yield of $14,000 per annum or $126,000 for 9 years, *i.e.*, 1977 to 1985. This loss will continue to accrue until the remedial measures have actually been implemented. Judgment is entered for the plaintiffs in the sum of $94,500 (*i.e.* ¾ x $126,000) as damages for loss of use of the property from 1977 to 1985;

(3) the parties are at liberty to submit detailed proposals to the relevant authority for approval. As soon as the authorities have approved a scheme and the costs of it have been ascertained, the parties will apply to the Court to assess damages;

(4) the defendants are ordered to deposit in Court or to furnish a Bank Guarantee acceptable to the plaintiffs in the sum of $450,000 which will be held in reserve until decision of Court on the final estimates for the costs of the remedial measures and the appropriate legal principles applicable;

(5) the plaintiffs will have an immediate order to have their costs taxed up to date and paid by the defendants.

Cases referred to:

(1) *Seong Fatt Sawmills Sdn. Bhd.* v. *Dunlop (M) Industries Sdn. Bhd.* [1984] 1 M.L.J. 286.

(2) *Dodd Properties Ltd.* v. *Canterbury City Council* [1979] 2 All E.R. 118.

(3) *Perry* v. *Sidney Phillips & Son* [1982] 1 All E.R. 1005.

(4) *Paula Lee Ltd.* v. *Robert Zehil & Co. Ltd.* [1983] 2 All E.R. 390.

(5) *Tito* v. *Waddell* [1977] 1 Ch.D. 106.

CIVIL SUIT.

Gary Yuen for the plaintiffs.
C.K.G. Pillay for the defendants.

Cur. Adv. Vult.

Shankar J.: This is a claim for damages based in nuisance and trespass. The plaintiffs allege that their land comprised in Lot 4128 Mukim of Senai, Kulai, District of Johore Bahru became unusable as a result of flooding and water-logging which was directly caused by the defendants' interference with a natural stream which flowed through Lot 4128 aforesaid and the adjoining lot 4127 belonging to the defendant.

The salient facts now follow. From April 1972 the ownership of Lot 4128 was vested as to an undivided half share in the 1st plaintiff, Toyo Textiles Industries Sdn. Bhd. (Toyo), an undivided quarter share in the 2nd plaintiff, Chong Wui Yong and an undivided quarter share in one Wong Kit Sing who died in 1981. The land is a rectangular plot. The plaintiffs' claim is that a natural stream ran across their land in a south-west to north-west direction. It approximately bisected Lot 4128 along a diagonal axis. The plaintiffs say that it emerged from Lot 4128 about two-thirds of the way up from its eastern boundary into Lot 4127 through which it continued until it reached the main JKR culvert adjacent to the main North-South highway running from Johor Bahru through Kulai towards Air Hitam. After they became owners of Lot 4128

the plaintiffs commenced to erect a factory on the higher ground towards the North-western boundary. The natural contours of Lot 4128 are such that the stream represented the lowest point in a valley which was formed by 2 slopes rising from either side of it towards the North-western and South-eastern boundaries.

The plaintiffs' complaint in their Statement of Claim is that prior to August 1973, Lots 4128 and 4127 were in their natural state such that 4127 was lower in level. The stream aforesaid therefore naturally gravitated through the lots to the culvert. But the defendant, a housing development company, decided to raise the level of Lot 4127 by 4 to 8 feet higher than Lot 4128 along the common boundary. The result of this earthwork operation was to fill up the natural water course, block it at the boundary line and thereby cause a back-up which created large pools of stagnant water on Lot 4128. It is also pleaded that the defendants trespassed on the Lot 4128 by digging a trench in Lot 4128 alongside its boundary with Lot 4127. This exercise was calculated to divert the water along the common boundary so as to enable it to run off at the North-eastern extremity of Lot 4128 but it proved ineffective.

Although the acts complained of occurred in 1973 the plaintiffs, for reasons given hereafter, only filed their action in September, 1977. The Defence was filed in November 1977 and amended in December 1978. In it the defendants denied that there was a natural water course as claimed by the plaintiffs. In the alternative, the defendants denied that it was blocked. If it was, the defendants claimed that it did not amount to a nuisance in law. The defendants further pleaded that they had no knowledge of any water-logging on the plaintiffs' land and in the alternative, they pleaded that even if the plaintiffs' land was water-logged they had not suffered any loss or damage therefrom. As for the trench, the defendants pleaded that it was the work of a person or persons unknown and the defendants denied they were responsible for the construction thereof or for its maintenance.

With the battle-lines drawn thus, the issues of fact were clear.

On liability, the plaintiffs' evidence was as follows: They called Mr. Teoh Cheng Keong (PW.3) the State Director of the Survey Department in Johor Bahru. He produced for inspection only Table-sheet – Kulai XXVII which had been checked in 1973. It showed a stream running through both Lots 4128 and 4127. The width of this stream is shown to be approximately 12 feet wide. No swamp of any kind is shown in the table sheet and Mr. Teoh has given evidence that if there had been a swamp on Lot 4128 in 1972 it would have been demarcated on the map.

Mr. Chong Wei Foong (Chong) is the General Manager of Toyo. From personal knowledge, he stated that in its natural state, Lot 4128 had this stream running through it into Lot 4127. There was no swamp or water-logging at that time. Another document in evidence before me is the extract of topographical map from the Government Survey Department Survey Sheet 130 Series L7010 Additional 4-PPMM. This document also shows a stream running through the properties and ending at the JKR culvert. It does not show any swamp whatsoever. On the basis of this evidence, I find as a fact that there was a natural stream flowing through Lot 4128 and 4127, in and prior to 1973.

For the purposes of this case it is unnecessary to say where the stream originated except to observe that it had its source in the upper reaches of the hinterland and that before it entered Lot 4128 it had to traverse the neighbouring lots.

From personal knowledge, Mr. Chong stated that in August 1973 or thereabouts, the defendants who were housing developers, commenced to fell trees and level the earth on Lot 4127. The directors of the defendant company were childhood friends of Chong. They were Dato' Wong Kee Tatt, Dato' Chai Khuan Kee, and Mr. Wong Kit Seng who it will be remembered owned an undivided quarter share in Lot 4128. The tree felling and the levelling of Lot 4127 was followed by the raising of the level of Lot 4127 from 4 to 8 feet along its common boundary with Lot 4128. The result of all this was to interfere with the outlet of the stream from Lot 4128 into 4127 by literally blocking it off. The water backed up and Lot 4128 got flooded.

Chong, as the plaintiffs' spokesman, tried to resolve the matter by making several verbal complaints to the defendants' directors. Eventually on August 4, 1976, a meeting was held with the defendants' directors and in a written document the defendants agreed to fill the low-lying areas on Lot 4128 by providing sufficient earth to fill a volume of 350 feet by 600 feet by 5 feet. But after only providing 5-10% of the quantity of earth

stipulated in the agreement, the defendants left the plaintiffs to their own devices. Chong also complained that despite his protests, the defendant dug a drain on Lot 4128 near the common boundary and piled this drain with bakau piles, to prevent earth from the artificially elevated portion of Lot 4127 coming into Lot 4128. If this was intended to alleviate the water-logging on Lot 4128, it did not succeed.

Now the only witness the defendants called to contest Mr. Chong's evidence was one Mr. Chai Teck Fook who said that he was the Company Manager of the defendants in 1973. Far from controverting the evidence of Mr. Chong, he in fact confirmed it on all material points. Through him a letter was produced written by the Assistant Collector of Land Revenue, Kulai dated December 20, 1973 from which it appeared that starting from August 1973, the plaintiffs had through their Solicitors complained about the flooding followed by persistent reminders into December 1973. The Collectors' investigations showed that the floods were caused by the raising of lots 4127 and 4126 and other lots. He also pointed out that the owners of lot 4126, 4127 and 3235 (*i.e.*, the defendants) had built a drain 4 or 5 feet wide starting from the middle boundary of Lots 4127 and 4128 leading to the boundary of Lots 4126 and 7328, 7324 and 7320. The Drainage and Irrigation Department had said that this drain was not sufficient and he proposed to ask the owners of Lots 4126 and 4127 to make it broader.

It is also apparent from this letter that the owner of Lot 4128 had complained of trespass because the Collector said that he was unable to take any action about this because the land in question was not Government land.

Mr. Chai Teck Fook's evidence is that as requested by the authorities, they widened and deepened the drain. But once they got their certificate of fitness for occupation for the houses on Lot 4127, he claimed that the responsibility for the maintenance and servicing of the drain had passed out of their hands into the Drainage and Irrigation Department and left it to be implied that they therefore had no further responsibility in the matter. He disclaimed any knowledge of the cutting of the trench or the drain near the common boundary but admitted that they had piled the area to prevent earth from slipping into Lot 4128.

Contrary to the averments in the amended defence where the defendant disclaim any knowledge of water-logging on Lot 4128, Mr. Chai now sought to assert that parts of Lot 4128 had been water-logged and was swampy even before they had commenced their works on Lot 4127. If it was desired to challenge the evidence of Mr. Chong, it would have been a simple matter for the defendant to call the directors of the defendant company with whom Mr. Chong discussed the remedial measures. But none of them were called. The defendants had architects, engineers and a site foreman who were actively concerned in the planning, processing and implementation of the development of the housing estate. None of them was called either. The role played by Mr. Chai Teck Fook as Manager appears to have been a passive one. He says he left the activity on the site to the professional persons the defendant company had engaged and the site foreman. If there was anything wrong he expected them to complain to him but they did not. But what emerged through cross-examination was that it was only by a letter dated July 23, 1975 that the Director of Lands and Mines had confirmed the official approval for the scheme on Lot 4127. The defendant had submitted a layout plan earlier and the authorities required the defendant to carry out drainage works in accordance with the requirements of the relevant authority. Paragraph 4 of the approval letter required the defendant to submit 10 copies of their earthworks plan and contour plans for the consideration and approval of the Chairman of the Local Council. The defendants were advised that they were not to carry out any earthworks which had not been approved by the relevant authority and their attention was called to section 91A of the Town Boards Enactment No. 118 Johore.

Taking this letter together with the earlier letter of the Assistant Collector of Land Revenue dated December 20, 1973, the inference is inescapable, that what the defendants did in raising the level of Lot 4127 above that of Lot 4128 and in diverting the natural stream aforesaid, was not only something which was objectionable to the plaintiffs, but also appeared to have been wholly unauthorised and carried out without the approval of the relevant authority; furthermore the statement in the letter dated June 17, 1985 that the drain built by the defendants along the common boundary was thought by the Drainage and Irrigation Department to be insufficient, leaves the Court with no alternative but to conclude that no plans had been submitted by the defendants to that Department for approval before the stream was diverted by the defendants.

Mr. Gary Yuen, counsel for the plaintiffs, submitted a number of cases, all highly relevant, which set out the law relating to liability. I need only refer to *Siong Fatt Sawmills Sdn. Bhd.* v. *Dunlop (M) Industries Sdn. Bhd.*[1] That is a decision of the Federal Court and what Abdul Hamid F.J. has elucidated there on the liability of an adjoining landowner for water damage, need not be repeated here.

On the facts and the law and fully assisted by the trenchant manner in which Mr. Gary Yuen presented his case, this court has no hesitation in finding for the plaintiffs.

I would go further to state that the defendants in this case acted completely without regard to the plaintiffs' rights and acted wantonly and quite unreasonably in all the circumstances.

The defendants' conduct is all the more a matter for criticism because having literally created a *fait accompli* in 1973 by raising the level of their land, in the face of the plaintiffs' complaints, they then failed to carry out the remedial measures which they agreed to in 1976 thereby forcing the plaintiffs to come into court.

Whilst the issue of liability was easily disposed off, I have had some problems in determining what the proper measure of damages should be.

Mr. C.K.G. Pillay, counsel for the defendants, had ably brought out that Lot 4128 remains an agricultural title up to this day. The proposition that plaintiffs cannot throw their claims for damages at the head of the court but must prove the same is too well established to need authority.

There was not a shred of evidence to show that the commencement of the plaintiffs' operations in putting up a factory on Lot 4128 was authorised by the relevant authorities or that the plaintiffs had applied for conversion of the use of the land for that purpose. If the plaintiffs suffered a setback in the completion of the factory and thereby lost anticipated profits, there is no evidence of that either. Mr. Chong's attitude was that since the land was flooded by the defendants' operation there was no point in doing anything about it until proper compensation had been extracted from the defendants to put matters right. In the meantime he told the court that the plaintiffs were not prepared to sell Lot 4128 under any circumstances. One of the plaintiffs' witnesses was Mr. Quek Tee Kim, a licensed Land Surveyor. In cross-examination, he said that he had applied on behalf of the plaintiffs in 1974 for conversion of Lot 4128 from agricultural to industrial user but is unable to enlighten the court on the result of this application. He also says that the applied for conversion of the land for housing (presumably after he was engaged to survey the land in 1977) but this application was rejected without any reasons being given.

The area however has been zoned for industrial use although the defendants are using their land in the vicinity for other housing development.

In July 1977 the plaintiffs had engaged M/s C.H. Williams, Talhar & Wong Sdn. Bhd. to estimate the loss in value of Lot 4128 arising from the flooding due to the absence of a suitable drainage outlet. The job was carried out by Mr. Khambaty a registered Surveyor who gave evidence before me. Through him was produced their written report dated August 9, 1977 in which the estimate of the loss in value of the land was made on the basis of the costs which would then be incurred to re-instate the property to its original condition. Relying upon an engineer's report by J. Berakan Jurutera Berunding dated June 6, 1977 (which was not produced) and upon his own professional knowledge and inquiries Mr. Khambaty estimated that approximately 70% of Lot 4128s would require earth filling to a depth of about 4½ feet in order to re-instate the land to its original condition. He estimated that it would take approximately 6 months for earth filling, compacting and construction of suitable drains and that the costs of carrying out this work would be about $145,000. Mr. Khambaty was again engaged in January 1985 by the plaintiffs. He now had his own firm Param & Associates. His brief was to ascertain the loss in value of Lot 4128 as at July 1977 and as at present. This time his approach was to take the value of the land as if it had not been flooded and to compare it with its reduced value in its water-logged condition. He said that in July 1977 the value without flooding would be approximately $280,000 and after flooding $140,000 thereby giving a figure of say $140,000. The corresponding values for 1985 gave a difference of say $327,000.

Another witness called by the plaintiffs was Mr. Kan Yuet Kee. He is a Civil Engineer and visited the site for the first time in January 1985. The cost of the remedial works Mr. Kan has proposed is estimated at $661,000. His suggestion envisages the building of reinforced concrete drains, and widening and dredging operations and the esti-

mated construction is based on preliminary designs. Other costs including acquisition of land which may arise therefrom have not been taken into consideration. Altogether it is observed that his solutions appear somewhat sophisticated and if carried out will result in a drainage system on Lot 4128 which cannot in any sense be described as restoring Lot 4128 to its previous natural condition, as near as may be. It would be more accurate to say that if his remedial works are carried out, the plaintiffs will become the beneficiaries of a drainage system which is sophisticated enough to render Lot 4128 ready for immediate take-off for industrial development.

The defendants also called an expert. He is Mr. Lee Tong Fatt who is a Civil Engineer who has been in practice in Johore for the last 10½ years. He visited the site for the first time in May 1985. In the course of his evidence, he sought to suggest that in 1973 and throughout its history, Lot 4128 had always suffered from water-logging and that in this respect it would be unsafe to rely upon the topographical map. The suggestion is that where there is a swamp and water-logging it is not an easy thing to define the actual location and direction of the flow of water. Thus what appears on the maps as a stream may in fact be a swamp.

With respect to Mr. Lee, this court is not prepared to accept this opinion because it is pure conjecture based on the kind of vegetation which he saw in the water-logged areas in 1985. I prefer the eye-witness account of Mr. Chong and the evidence of Mr. Teo in this respect and I hold that there was no swamp on Lot 4128 in 1973 before the earthworks of the defendants commenced. I also hold that the stream would have run along the lowest point on the contour lines through Lot 4128 into Lot 4127. Mr. Teo's tracing on the contour plan of the position of the stream as it appeared in the table sheet was only an approximate estimation and did not take into account the contour lines on the map, or the well-established law in physics that water always finds its own level.

In other respects however, Mr. Lee's evidence creates severe difficulties. His estimate of the remedial costs to restore Lot 4128 to its original condition was but a small fraction of the costs estimated by Mr. Kan.

To get a proper perspective of matters I visited the scene with the parties. Lot 4128 remains undeveloped to this day. The factory which the plaintiffs commenced to build has long been abandoned. The swamp has more or less been cut in half by a bund erected by the plaintiffs on the northern side of the property and forms a wedge creating a bottle-neck in the middle of the swamp. Just south of this bottle-neck the land rises steeply to the high ground on the southern side of Lot 4128 where it shares a common boundary with Lot 3235 which also belongs to the defendants.

Lee's solution to overcome the water-logging was simplicity itself. He suggested removing the earth bund, improving the drainage outlet at the north-eastern boundary of Lot 4128, and clearing and de-silting the existing canal which runs from the northeastern boundary of Lot 4128 up to the JKR culvert on the main Johor Bahru-Kulai road. He estimated the costs of these works at a modest $20,000.

But this, he said, would not completely dry up Lot 4128. Heavy showers would still create pockets of water in the low lying areas. But that he says was the natural condition of the land in 1973, and I do not accept this. If, on the other hand, all water-logging is to be avoided, he says, earthworks are called for to fill up the low lying area in Lot 4128 to a height of 3 feet and then to provide for an earth drain in the filled area. On current prices, he estimates that this will cost approximately another $81,000. Once these works are carried out, he says, Lot 4128 will become usable land for the construction of a factory. His remedial works, he said, would take about 3 months.

Mr. Lee, however, has placed a caveat on his proposals. He says that he cannot be responsible for any special condition which the planning and other authorities may wish to impose. He concedes that any proposals for filling land and routing a drain through it must have DID clearance and such proposals must also be submitted to the local authorities who may or may not approve any designs which may be submitted to bring the land back into a usable state.

In his final submission, Mr. Pillay seems to suggest that the proper measure of damages here should be to award three-quarters of $145,000 which was what the remedial works were estimated to cost in August 1977. One-fourth of any damages awarded belongs to the estate of Mr. Wong Kit Sing. Mr. Yuen, on the other hand, says that the damages awarded should not be less than the cost of Mr. Kan's remedial measures. In addition, he claimed that the plaintiffs should be awarded

$327,000 for the loss of the use of the property because this is what Mr. Khambaty estimated the difference in the value of the land to be in 1985 in its wet and dry state. But with respect to counsel, I must confess that I have not derived as much assistance as I would have wished on this aspect of the case. If damages are to be awarded for loss of use, then it has to be proved, not only that there was an actual intention to use it for a factory but also, the Plaintiffs would have had to show what kind of financial projections they had in mind when the factory actually came into operation. If the figures were reasonable, it would have been a simple matter to calculate what the damages should have been. Here there is no such evidence available and the issue then is whether any award should be made at all on the notional basis that a reasonable return for a landowner in such circumstances is to give him say 5% of its capital value from the time its user may reasonably be regarded as having become effective, if not for the floods.

For lack of a better yardstick, this is the basis I propose to adopt for damages for loss of use. Remembering that the plaintiffs would have been content if the defendants had fulfilled their obligations as agreed to fill up the land, which they did not do, I have taken 1977 as the starting point, and an annual loss of 5% of $280,000 which gives a yield of $14,000 per annum or $126,000 up to and including 1985 (*i.e.*, for 9 years). This loss will continue to accrue until the remedial measures have actually been implemented. But as to the remedial measures themselves we have further problems. The plaintiffs are adamant that they do not wish to sell this land. So the only meaningful order that this Court can make in the interest of justice, is to direct that remedial works be carried out at the cost of the defendant. But then no remedial works can in reality be carried out until they have been approved by the relevant authorities and this is where the Court's difficulties arise. We simply do not know what is required by the relevant authority and it would therefore be an exercise in futility for this Court to make an award in money terms on the basis of the estimates provided either by Mr. Lee or by Mr. Kan.

Where a defendant has acted without regard to his neighbour's rights, or has acted wantonly and quite unreasonably in relation to his neighbour, he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the *status quo* even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiffs. I have already held on the facts that the defendants here did act wantonly and unreasonably in blocking up the natural course of this stream by elevating their land without first taking into account the mutual interests of all concerned let alone obtaining the benefit of the views of those in authority as to how best the land could be developed, without causing undue damage to others.

The situation today is that this stream can no longer pursue its original course because the natural contour of Lot 4128 where it joined Lot 4127 has been permanently and irreversibly altered by the existence of the houses on the raised land on Lot 4127.

Seong Fatt Sawmill Sdn. Bhd. v. *Dunlop (M) Industries Sdn. Bhd.* was somewhat unusual in that after the conclusion of the case in the first instance, the learned Judge allowed the claim for damages to the plaintiffs' building and goods but made no order on the plaintiffs' claim on loss and damage for stoppage of work due to the flood. He reopened the case to hear arguments on damages and gave a supplementary judgment for loss of profits and for inconvenience. The defendants contended on appeal that the Court had no jurisdiction to do this.

Abdul Hamid, F.J. (as he then was) said as to this at page 292:

> "With respect, we see no merits in the appellant's contention. We are firmly of the view that where it is necessary and the justice of the case requires it, the Court should be at liberty to reopen the case. It is particularly so where there has only been a provisional order and this is done to perfect an order."

That is the course I now propose to follow as regards the remedial costs of putting matters right.

I therefore order that both parties be at liberty to submit their detailed proposals to the relevant authority for approval and to prepare detailed estimates of the costs which will be incurred. As soon as the authorities have approved a scheme and the cost of it has been ascertained, the parties will apply to this Court for further argument to assess what is the proper measure of damages to be awarded for the remedial costs. In this way it is hoped that this court will avoid giving a judgment *in vacuo*, as it were.

In the light of the legal principles I have just

enunciated, what is in issue now, on this score, is not the expense to the defendants or the extent to which such expense may be out of all proportion to the advantage accruing to the plaintiffs. What has to be done now is to provide a proper drainage system which will cater for the needs of the situation in the manner required by law and the relevant regulations relating to drainage, and the expense arising out of and incidental to this must be borne by the defendants.

I have no information before me from which I can accurately predict how soon the relevant authorities will be able to make up their minds on what is an appropriate drainage and earthwork system for Lot 4128 and for the water course which flows through it.

Since the time frame is so uncertain and the defendants' financial circumstances may wittingly or unwittingly undergo some changes, in the meanwhile, I consider it just and equitable to order the defendants to deposit in this Court, or if they prefer, to furnish a Bank Guarantee in terms acceptable to the plaintiffs for the sum of $450,000 which will be held in reserve until such time as the decision of this Court is rendered on the final estimates for the costs of the remedial measures and the appropriate legal principles applicable to the situation.

Even a cursory study of the following decisions should make it evident that there are serious legal questions in deciding the magnitude of the damages to which the plaintiffs may finally be held to be entitled. The cases I have in mind are *Dodd Properties Ltd.* v. *Canterbury City Council,*[2] *Perry* v. *Sidney Phillips & Son*[3] and *Paula Lee Ltd.* v. *Robert Zehil & Co. Ltd.*[4] Counsel may also care to consider *Tito* v. *Waddell,*[5] a case which took 4 years to try and whose reported decision by Megarry V.C. runs into 241 pages. If nothing else, the result of these researches should make us all sadder and wiser in the realisation that the search for the proper measure of damages is a pursuit which creates almost as many problems as it solves.

In all the circumstances I give judgment to the plaintiffs forthwith for the sum of $94,500 which is three-quarters of $126,000 as damages for loss of use of the property from 1977 to 1985.

The plaintiffs will also have an immediate order that all their costs up to date be taxed and paid by the defendants.

As to further damages for loss of use and in respect of damages and the costs of providing a proper drainage system the parties are given liberty to apply generally as to the further conduct of this case until the dispute is finally resolved.

Claim allowed.

Solicitors: *Arthur Lee & Co.; Hassan Yunos & Co.*

PERNAS SIME DARBY HOLDINGS SDN. BHD. v. M. POOVANANDRAN

[A.C.J. (Zakaria Yatim J.) July 24, 1985]
[Kuala Lumpur – Civil Suit No. C289 of 1984]

Practice and Procedure – Pleadings – Striking out defence – Defence of bare denial – Defect in pleading – Affidavit evidence not admissible to rectify – R.H.C. 1980, O.18, r.19.

This was an appeal against the decision of the Senior Assistant Registrar, who ordered that the defendant's defence be struck off under Order 18 rule 19.

The plaintiffs' claim against the defendant was for liquidated sum of monies due and owing from the defendant (who was the employee of the plaintiffs) in the sum of $42,626.27. In this defence, the defendant denied the claim and put the plaintiffs to strict proof of the same. Subsequently, the defendant filed an affidavit which purported to improve the statement of defence.

Held: (1) there was no indication as to what was the nature of the defence. It was nothing but a sham defence and the Senior Assistant Registrar was right in ordering that the defence be struck off;

(2) the court was unable to consider the affidavit evidence in this case.

Cases referred to:

(1) *Remmington* v. *Scoles* [1897] 2 Ch. 1, 6.
(2) *UMBC* v. *Palm & Vegetable Oils* [1983] 1 M.L.J. 206.

CIVIL SUIT.

S. Ravichandran for the defendant/appellant.
P.H. Yeo for the respondents/plaintiffs.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an appeal against the decision of the Senior Assistant Registrar,